

In the Matter of
CONTRACTORS PLUMBING SERVICE, INC.,

Case No. 61-00

August 2, 2000

SYNOPSIS

Respondent employed Claimant as an office worker and paid her a weekly salary, with no additional pay for overtime hours worked. The commissioner rejected Respondent's argument that Claimant was an exempt "administrative employee." Claimant's primary duties were bookkeeping and payroll, functions that are not exempt from the overtime requirement. The commissioner found that Respondent's failure to pay the overtime wages was willful and ordered Respondent to pay Claimant \$2407.50 in unpaid wages, \$4453.68 in penalty wages, and interest on both amounts. ORS 652.140, ORS 652.150, ORS 653.020, ORS 653.025, ORS 653.055, ORS 653.261, OAR 839-001-0470, OAR 839-020-0005, OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 6, 2000, at the Eugene office of the Bureau of Labor and Industries, located at 165 East Seventh Street, Eugene, Oregon.

Linda Lohr, an employee of the Bureau of Labor and Industries ("BOLI" or "the Agency") represented the Agency. Wage claimant Rhonda Ralston was present during the hearing and was not represented by counsel. Respondent was represented at hearing by its attorney, Nick E. Rauch. Thomas Ryder, Respondent's president, was present throughout the hearing as Respondent's corporate representative.

The Agency called Claimant Rhonda Ralston and BOLI compliance specialist Irene Zentner as witnesses. Respondent called Thomas Ryder as its witness.

The forum received:

a) Administrative exhibits X-1 through X-9 (received or generated by the Hearings Unit prior to hearing) and X-10 and X-11 (received or generated by the Hearings Unit after the hearing).

b) Agency exhibits A-1 through A-12 (filed with the Agency's case summary) and A-13 and A-14 (submitted at hearing).

c) No Respondent exhibits.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or about March 5, 1999, Claimant completed and filed a wage claim form in which she stated that Respondent had employed her from April 1997 until March 5, 1999. Claimant asserted that Respondent paid her overtime wages “at first” and then stopped paying them. She claimed unpaid overtime wages from June 1, 1998, to February 26, 1999, in the amount of \$2388.00. Claimant filed an assignment of wages along with her wage claim form.

2) On April 2, 1999, the Agency sent Respondent a notice that Claimant had filed a wage claim for unpaid wages and overtime wages of \$2388.00. Respondent filed a response to the Notice of Claim later in April, in which it denied that wages were due.

3) On or about October 8, 1999, the Agency served Respondent with an Order of Determination. The Agency alleged that Respondent had employed Claimant from June 1, 1998, through February 28, 1999, at the regular rates of \$2064.00 and \$3096.00 per month, and that Claimant had worked a total of 96 hours that were hours worked over 40 in a given work week. The Agency further alleged that Respondent was required to, but did not, pay Claimant one and one-half times her regular rate of pay for

each of those 96 hours. The Agency concluded that Respondent owed Claimant \$963.50 in unpaid overtime wages, plus interest. Finally, the Agency alleged that Respondent's failure to pay the overtime wages was willful and that Respondent, therefore, owed Claimant \$4212.00 as penalty wages, plus interest. The Order of Determination required Respondent, within 20 days, either to pay these sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) Respondent filed a timely Answer and Request for Hearing in which it admitted it had employed Claimant, but denied "that portion [of the Order of Determination] pertaining to hours worked in excess of 40 hours per week and pay." Respondent also denied that it owed any unpaid or penalty wages to Claimant. In its defense, Respondent asserted that Claimant was employed as its office manager "and was paid on a salary basis and as such was exempt from overtime requirements." Respondent further asserted that it paid Claimant for all hours she reported, "as she prepared all payroll checks including her own."

5) On February 15, 2000, the Agency requested a hearing. On February 22, 2000, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 9:00 a.m. on May 3, 2000. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) On April 6, 2000, the forum issued a case summary order requiring the Agency and Respondent to submit summaries of the case that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency

only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by April 24, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The Agency filed a timely case summary. Respondent did not file a case summary even though its counsel received the case summary order.

7) On April 7, 2000, the Agency notified the forum that case presenter Linda Lohr would be handling the case on the Agency's behalf. The Agency also moved to postpone the hearing based on the unavailability of the Agency's key witness.

8) ALJ McCullough initiated a pre-hearing conference the next day and confirmed that Respondent's counsel did not oppose the Agency's motion for postponement. The participants agreed that June 6, 2000, would be a convenient date for the hearing and the ALJ reset the hearing to commence on that day. The ALJ also changed the deadline for filing case summaries to May 26, 2000.

9) On May 23, 2000, the Agency moved for an order requiring Respondent to produce 12 categories of documents.

10) On May 24, 2000, the hearing was reassigned to ALJ Erika Hadlock. That day, ALJ Hadlock granted the Agency's motion for discovery order as to 11 of the 12 categories of requested documents. The ALJ ordered Respondent to produce the documents to case presenter Lohr no later than 5:00 p.m. on Thursday, June 1, 2000.

11) At the start of the hearing, counsel for Respondent stated that he had received the Summary of Contested Case Rights and Procedures and had no questions about it.

12) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) After the Agency presented its case, Respondent sought to introduce the evidence of Ryder and Respondent's current office manager, Sandy. Respondent's counsel acknowledged that he had received the ALJ's case summary order, which required him to identify witnesses and documentary evidence he planned to introduce at hearing, and that he had not filed a case summary. Respondent's counsel did not offer a satisfactory reason for having failed to file the case summary. The ALJ refused to allow Respondent to call Sandy as a witness because Respondent's failure to file a case summary meant that the Agency had no notice that Sandy might testify and no opportunity to prepare to meet her testimony. The ALJ did allow Respondent to call Ryder as a witness because: the forum has permitted individual Respondents to testify on their own behalf even when they were not identified as witnesses in a case summary; Ryder was the president of Respondent, a small corporation with only two shareholders; Ryder was in charge of Respondent's operations; and the Agency suffered only minimal prejudice, as Ryder's involvement in the events at issue and his desire to testify could not have come as a surprise.

14) Respondent also sought to introduce certain documents even though it had not filed a case summary. The Agency case presenter had received copies of those documents prior to hearing, but had not chosen to include them in her own case summary and did not have them with her at hearing. Respondent also did not have the documents and asked the ALJ to leave the record open so the Agency's copies of the documents could be entered into evidence after the hearing. The ALJ denied Respondent's request because introducing the documents after the end of the hearing

would deprive both the Agency and the ALJ of the opportunity to question witnesses about the documents.

15) The ALJ issued a proposed order on June 21, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed timely exceptions, which are addressed in this Final Order. The Respondent filed untimely exceptions, which are also addressed in this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent operated a plumbing business in Eugene, Oregon, employing plumbers to work on residential and commercial construction. From 1997 through early 1999, the number of plumbers employed by Respondent fluctuated between about 5 and 25.

2) Thomas Ryder is Respondent's president and is in charge of the company's operations.

3) In March 1997, Ryder hired Claimant to work as Respondent's office manager. Claimant spent the majority of her time doing bookkeeping and paperwork associated with payroll. She also answered telephones, ordered supplies, relayed messages to Ryder and plumbers working in the field, and did general secretarial and clerical work.

4) Respondent initially paid Claimant \$10.00 per hour and paid her overtime wages when she worked more than 40 hours per week. Every week that Claimant worked for Respondent, she completed a time card that she submitted to Ryder along with time cards for Respondent's other employees.

5) Ryder spent relatively little time at Respondent's office and Claimant frequently was the only person working there. On a few occasions, Claimant told Ryder that she had too much work to do and Ryder authorized her to get temporary clerical

employees through an agency. These temporary employees worked for Respondent for very short periods of time and received lower wages than Claimant. Claimant did not interview the temporary employees before they started working for Respondent.

6) Claimant did not have hiring, firing or disciplinary authority, and did not interview prospective employees on Respondent's behalf. Claimant did not supervise any of Respondent's employees, except for giving instructions to temporary workers on such things as how to do filing.

7) Respondent was a subcontractor on some public works projects and Claimant signed some of the certified payroll reports for those projects. Claimant also was authorized to sign certain payroll documents. In addition, she signed for materials delivered to Respondent's office. It is common practice in Oregon for bookkeepers and payroll clerks to complete certified payroll reports.

8) Claimant once attended a meeting with Ryder and Respondent's attorney regarding whether Respondent's business should become a union shop. Claimant did not attend that meeting as part of Respondent's management team. Rather, she accompanied Ryder because he felt uncomfortable going to that meeting alone because of his physical condition. Claimant offered Respondent her opinion on whether the business should "go union," but only as one of Respondent's several employees, not as part of the decision-making team.

9) Claimant sometimes attended lunches and other events with Ryder during which they would socialize with other people in the construction or plumbing industries. Claimant did not attend those meetings to negotiate deals or to form management-level business relationships on Respondent's behalf. Rather, she attended those events merely to become acquainted with the people with whom Respondent did business.

10) Claimant's primary duties remained essentially the same throughout her employment by Respondent, except that her payroll duties increased after Respondent stopped using an outside firm to issue payroll checks.

11) At no time did Claimant have authority to make independent decisions regarding the operation of Respondent's business. Although Ryder did not closely oversee her work on a day-to-day basis, Claimant performed her work according to his instructions and pursuant to his direction. Claimant made no significant judgment calls and exercised no significant discretion in carrying out her duties. Rather, when substantive questions arose, Claimant looked to Ryder for direction.

12) Respondent periodically gave Claimant \$2.00 per hour raises. By June 1, 1998, Respondent had agreed to pay Claimant at the rate of \$16.00 per hour. Respondent called this wage a "salary" and based Claimant's weekly pay of \$640.00 on a 40-hour work week, although Claimant frequently worked more than 40 hours per week and sometimes worked fewer hours. At some time near June 1, 1998, Ryder discovered that Claimant had included overtime pay in her paycheck. Ryder told Claimant that he did not pay overtime to "salaried" workers and said that if she wanted overtime pay, she could go back to working for a lower hourly wage. Claimant deducted the overtime wages from her paycheck at Ryder's instruction.

13) From June 1, 1998, through October 9, 1998, Claimant worked a total of 754.5 hours, 48 of which were hours worked in excess of 40 per week. Respondent did not pay Claimant one and one-half times her regular rate of pay for those overtime hours. Rather, Respondent paid Claimant a salary of \$640.00 per week, regardless of number of hours she worked.

14) Starting on October 12, 1998, Respondent agreed to pay Claimant at the rate of \$18.00 per hour, again on a "salary" basis that assumed a 40-hour work week.

From October 12, 1998, through February 27, 1999, Claimant worked a total of 806.5 hours, 46.5 of which were hours worked in excess of 40 per week. Respondent paid Claimant \$720.00 (\$18.00 x 40) for each work week in this time period, regardless of the number of hours Claimant actually worked.

15) The forum infers that Respondent knew that Claimant was working overtime because Respondent had paid Claimant overtime wages for working similar hours in the past, Claimant gave Ryder her weekly time cards, and Ryder told Claimant that she would not receive overtime wages once she started earning \$16.00 per hour. Respondent made a deliberate decision not to pay Claimant overtime wages after June 1, 1998.

16) Throughout her employment with Respondent, the amount Claimant earned on an hourly basis was less than the wage earned by many, if not all, of the plumbers who worked for Respondent.

17) Claimant quit work on March 5, 1999, and filed her wage claim with BOLI the same day.

18) Claimant provided BOLI with copies of the time cards she had completed each week she worked for Respondent, starting on June 1, 1998. Claimant completed BOLI wage claim calendars based on those time cards.

19) Claimant's testimony was sufficiently credible to establish the Agency's prima facie case. Claimant testified credibly regarding the nature of her duties, the hours she worked, and the fact that she completed a time card each week she worked for Respondent. However, Claimant was uncertain about dates and was a bit slow to admit facts that she appeared to believe might support Respondent's defense that she was an exempt employee. In addition, Claimant harbored some hostility toward Ryder and several times made gratuitous negative statements about him, although she also

acknowledged ways in which Ryder had treated her well. Overall, Claimant's animosity toward Ryder did not appear to have influenced her testimony in material respects.

20) Ryder's testimony, on the other hand, was not credible at all and the forum has given it no weight except where it was corroborated by other credible evidence. Ryder exaggerated certain aspects of Claimant's job duties in an effort to show both that she was an exempt employee and that she had not performed her job well. For example, Ryder repeatedly called Claimant his "right-hand person" and said that he had hired her to teach her the plumbing business. In support of that claim, Ryder stated that one of Claimant's job duties was helping him bid on projects. When questioned more specifically, however, Ryder was able to identify only one project on which Claimant had worked on a bid. He also acknowledged that all Claimant had done was measure some lines on blueprints so Ryder could determine how much pipe would be used in the plumbing. In another instance, apparently believing that having independent purchasing authority would make an employee exempt, Ryder asserted that Claimant had such authority. Upon further questioning, he stated that she had purchased several staplers and had decided what type of pens to order. At another point in his testimony, Ryder said that because of bookkeeping mistakes Claimant had made, Respondent was getting fined "up the kazoo." On cross-examination, Ryder was able to identify only one type of mistake Claimant had made and only one fine that had been imposed as a result.

21) Respondent produced no time cards for Claimant to the Agency during its investigation, despite the requests of Irene Zentner, an Agency compliance specialist. A few days before hearing, Respondent produced some original time cards for Claimant. Ryder testified that his employees had just located those time cards in a box in a warehouse where they should not have been located. He asserted that he had not

previously known that any time cards for Claimant existed and insinuated that Claimant had completed the cards and hidden them without his knowledge. The Agency then introduced evidence that on July 29, 1999, during the Agency's investigation, an employee of Respondent's attorney faxed a note to Carol, an employee of Respondent, attaching a note stating "No time cards April, May Jan – Mar. Time cards June 98 forward." Later that day, Carol faxed a note to Respondent's attorney's employee stating "there are no time cards for the month of April 1998, May 1998. (none for Jan. thur [sic] Mar. 1998) **There seem to be time cards from June on. Copy attached:** Time cards June[,] Payroll stud detail June[,] Form 132 1998 2/98 qtr" (emphasis added). Attached to that fax were copies of some time cards for Claimant from June 1998. Despite these fax communications, neither Respondent nor Respondent's attorney informed the Agency that time cards for Claimant had been located. The forum finds that the Agency proved by a preponderance of the evidence that Respondent had at least constructive knowledge of the existence of Claimant's time cards and failed to produce those time cards to the Agency during its investigation. The forum disbelieves Ryder's testimony that he was unaware of the existence of any time cards until a few days before hearing.¹

22) Ryder also made several accusations against Claimant that were not substantiated by any other evidence in the record. He claimed at hearing that Claimant ran her husband's business out of Respondent's office. In an earlier communication to the Agency, he asserted that Claimant had taken her payroll files with her when she left Respondent's employ. Ryder also claimed that Claimant had falsified time cards, kept them hidden from him, and somehow spirited the time cards into a warehouse where Respondent did not discover them until shortly before the hearing. These accusations were uncorroborated, they conflict with Claimant's credible testimony and pre-hearing

statements, and the forum does not believe them. The fact that Ryder made accusations he could not back up further detracts from his credibility.

23) Finally, Ryder was extremely hostile toward Claimant and the Agency case presenter during the hearing. He glared at both women during much of the hearing and, during the Agency's closing argument, held up a sign to the Agency case presenter that read: "You are a liar." From all the facts described in Findings of Fact – the Merits 20, 21, 22 and 23, the forum concludes that Ryder's anger and frustration about Claimant's wage claim influenced his testimony in material respects. Because of that influence, the forum finds Ryder's testimony to be far less credible than Claimant's.

24) As part of her investigation, Zentner calculated the unpaid wages and penalty wages she believed Respondent owed Claimant. In performing those calculations, Zentner decided that Claimant was entitled to pay only for hours she actually worked because she was not an exempt employee. Accordingly, Zentner determined that Claimant had earned a total of \$12,588.00 (712.5 hours x \$16.00/hour + 49.5 overtime hours x \$24.00/overtime hour) during the time that her regular wage was \$16.00 per hour. Because Respondent had paid her only \$12,160.00, \$428.00 was due and owing. Zentner also calculated that, during the time that Claimant's regular wage was \$18.00 per hour, she had earned a total of \$14,935.50 (760 hours x \$18.00/hour + 46.5 overtime hours x \$27.00/overtime hour), of which Respondent had paid only \$14,400.00, leaving \$535.50 due and owing. Thus, Zentner calculated that Respondent owed Claimant a total of \$963.50 in unpaid wages.

25) The forum disagrees with Zentner's damage figures for two reasons. First, Zentner determined that Claimant had worked 712.5 regular hours and 49.5 overtime hours from June 1 through October 9, 1998. In fact, Claimant worked only 706.5 regular hours and 48 overtime hours during that period. Second, Zentner's calculations

are based on her determination that Respondent paid Claimant strictly on an hourly basis. Accordingly, she decided that Claimant was entitled to be paid only for the hours she actually worked and was not entitled to 40 hours of pay for weeks during which she worked fewer than 40 hours, despite the fact that Respondent paid her as if she had worked a full week. The forum has concluded, to the contrary, that Respondent paid Claimant on a salary basis regardless of the number of hours she actually worked. Consequently, pursuant to OAR 839-020-0030(3)(d), Claimant was entitled to her full salary for each week she worked, *plus* additional wages for her overtime hours. The forum finds that Respondent owes Claimant an additional \$1152.00 for the 48 overtime hours she worked from June 1 through October 9, 1998 (48 hours x 1.5 x \$16.00/hour). Respondent also owes Claimant \$1255.50 for the 46.5 overtime hours she worked from October 12, 1998, through February 27, 1999 (46.5 x 1.5 x \$18.00/hour), for a total of \$2407.50 in unpaid wages.

26) The forum calculates penalty wages in accordance with ORS 652.150, OAR 839-001-0470, and Agency policy as follows:

“Total earned during the wage claim period divided by the total number of hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days.’ * * * Statement of Agency Policy, July 23, 1996.”

In the Matter of Belanger General Contracting, 19 BOLI 17, 26 (1999). In this case, Claimant earned a total of \$28,967.50 during the claim period (including the overtime wages she earned but was not paid) and she worked a total of 1561 hours. Accordingly, the penalty wages due Claimant are $\$28,967.50/1561 \times 8 \times 30 = \4453.68 .

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent owned and operated a plumbing business in Eugene, Oregon. Respondent employed Claimant as an office worker from March 1997 until March 5, 1999, when Claimant quit her job.

2) At all material times, Claimant's primary job duties were bookkeeping and doing payroll. Claimant spent most of the remainder of her time at work performing clerical tasks.

3) Claimant did not customarily and regularly exercise discretion and independent judgment in her job. Rather, the decisions Claimant made in carrying out her duties involved the application of procedures prescribed by Ryder.

4) From June 1 through October 9, 1998, Respondent paid Claimant a salary of \$640.00 per week, based on a 40-hour work week, regardless of the number of hours she actually worked. During this time period, Claimant worked 754.5 hours, 48 of which were hours in excess of 40 per week. Respondent paid Claimant only \$12,160.00 for this work.

5) From October 12, 1998, through February 27, 1999, Respondent paid Claimant a salary of \$720.00 per week, based on a 40-hour work week, regardless of the number of hours she actually worked. During this time period, Claimant worked 806.5 hours, 46.5 of which were overtime hours. Respondent paid Claimant only \$14,400.00 for this work.

6) Respondent's failure to pay overtime wages to Claimant was willful and more than 30 days have passed since those wages became due.

7) Civil penalty wages, calculated in accordance with ORS 652.150, OAR 839-001-0470, and Agency policy, equal \$4453.68.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

"(3) 'Employ' includes to suffer or permit to work * * *.

"(4) 'Employer' means any person who employs another person * * *."

Respondent was Claimant's employer.

2) ORS 653.261(1) provides:

“The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits.”

OAR 839-020-0030 provides, in pertinent part:

“(1) Except as provided in OAR 839-020-0100 to 839-020-0135 all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1). * * *

“* * * * *

“(3) Methods for determining amount of overtime payment under different compensation agreements:

“(a) Compensation based exclusively on hourly rate of pay:

“(A) Where the employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate". For hours worked in excess of forty (40) hours in a work week the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of forty (40);

“* * * * *

“(d) Compensation based upon a weekly salary agreement for a regular work week of 40 hours:

“(A) Where the employee is employed on a weekly salary, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate;

“(B) For example, where an employee is hired at a salary of \$280 and it is understood that this weekly salary is compensation for a regular work week of 40 hours, the employee’s regular rate of pay is \$7 per hour and such employee must be compensated at the rate of \$10.50 per hour for each hour worked in excess of 40 hours in such work week.”

From June 1, 1998, through October 9, 1998, Claimant’s regular rate of pay was \$16.00 per hour, based on a salary of \$640.00 for a 40-hour work week. Respondent was required to pay Claimant one and one-half times \$16.00 – or \$24.00 – for each hour

Claimant worked over 40 in a week. During this period, Respondent did not pay Claimant any wages in addition to her weekly salary for the 48 hours she worked that were hours in excess of 40 per week. Consequently, Respondent owes Claimant \$1152.00 in unpaid overtime wages for the period June 1 through October 9, 1998.

From October 12, 1998, through February 27, 1999, Claimant's compensation was \$18.00 per hour, based on a salary of \$720.00 for a 40-hour work week. Respondent was required to pay Claimant one and one-half times \$18.00 – or \$27.00 – for each hour Claimant worked over 40 in a week. During this period, Respondent did not pay Claimant any wages in addition to her weekly salary for the 46.5 hours she worked that were hours in excess of 40 per week. Consequently, Respondent owes Claimant \$1255.50 in unpaid overtime wages for the period October 12, 1998, through February 27, 1999.

3) ORS 653.055(1) provides:

"(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:

"(a) For the full amount of the wages, less any amount actually paid to the employee by the employer; and

"(b) For civil penalties provided in ORS 652.150."

Respondent owes Claimant a total of \$2407.50 in unpaid wages.

4) ORS 652.140 provides, in pertinent part:

"(2) When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays, and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Because Claimant quit work on March 5, 1999, her wages were due and payable no later than March 12, 1999. Respondent violated ORS 652.140 by not paying Claimant all wages she was due by that date.

5) ORS 653.020 provides, in pertinent part:

“ORS 653.010 to 653.261 does not apply to any of the following employees:

“* * * * *

“(3) An individual engaged in administrative, executive or professional work who:

“(a) Performs predominantly intellectual, managerial or creative tasks;

“(b) Exercises discretion and independent judgment; and

“(c) Earns a salary and is paid on a salary basis.”

OAR 839-020-0005 provides, in pertinent part:

“(2) ‘Administrative Employee’ means any employee:

“(a) Whose primary duty consists of either:

“(A) The performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer’s customers; or

“(B) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein.

“(b) Who customarily and regularly exercises discretion and independent judgment; and

“(c)(A) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or

“(B) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

“(C) Who executes under only general supervision special assignments and tasks; and

“(d) Who earns a salary and is paid on a salary basis pursuant to ORS 653.025 exclusive of board, lodging, or other facilities.”

“* * * * *

“(5) ‘Independent Judgment and Discretion’ means the selection of a course of action from a number of possible alternatives after consideration of each, made freely without direction or supervision with respect to matters of significance. It does not include skill exercised in the application of prescribed procedures.”

Respondent did not meet its burden of proving that Claimant was an administrative employee exempt from overtime pay requirements.

6) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

OAR 839-001-0470 provides:

"(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

"(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

"(b) The rate at which the employee's wages shall continue shall be the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid;

"(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee's hourly rate of pay times 8 hours per day times 30 days.

"(2) The wages of an employee that are computed at a rate other than an hourly rate shall be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period."

Calculated pursuant to Agency rule and policy, Respondent owes Claimant \$4453.68 in penalty wages.

OPINION

RESPONDENT FAILED TO PAY CLAIMANT ALL WAGES SHE EARNED

To establish a prima facie case supporting a wage claim, the Agency must prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for Respondent for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230 (2000). In this case, only the third and fourth elements are disputed.

The amount of work Claimant performed for Respondent is easily determined by examining her time cards, which the forum finds reliable. Those time cards show that Claimant worked a total of 754.5 hours, 48 of which were hours in excess of 40 per week, from June 1 through October 9, 1998, when Respondent was paying her \$640.00 per week. The time cards also show that Claimant worked a total of 806.5 hours, 46.5 of which were hours in excess of 40 per week, from October 12, 1998, through February 27, 1999, when Respondent was paying her \$720.00 per week.

The remaining question is whether Claimant was improperly compensated for the work she performed. The participants agree that Respondent did not pay Claimant overtime wages during the period in question. Respondent raises the affirmative defense that it was entitled to pay Claimant on a salary basis, without additional payment for overtime hours, because she was an exempt “administrative employee.”

A person may be an “administrative employee” exempt from the overtime wage requirements if the person meets each of several criteria set forth in ORS 653.020(3) and OAR 839-020-0005(2). Two of those criteria are central to this case, and require the forum to examine:

- 1) Whether Claimant's "primary duty" consisted of the "performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer's customers[.]" OAR 839-020-0005(2)(a)(A).
- 2) Whether Claimant "customarily and regularly exercise[d] discretion and independent judgment[.]" OAR 839-020-0005(2)(b).

This forum has not previously discussed the type of "primary duties" that are typical of an exempt "administrative employee." There are no reported Oregon cases on point. Consequently, the forum looks for guidance to the federal regulations interpreting the federal exemption statute, which is nearly identical to ORS 653.020(3).² Those regulations, which include a definition of "administrative employee" very similar to the one in the Oregon regulation,³ provide a helpful discussion of the types of duties typically performed by exempt white-collar employees. They include: advising management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. 29 CFR sec. 541.205(b). Claimant did not perform any of these types of duties.⁴ The rules further state that "it is clear that *bookkeepers, secretaries, and clerks of various kinds* hold the run-of-the-mine positions in any ordinary business and *are not performing work directly related to management or general business operations.*" 29 CFR sec 541.205(c)(1) (emphasis added). Moreover,

"[a]n employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks."

29 CFR § 541.205(c)(2).

Claimant's primary duties were taking care of bookkeeping and payroll. She spent the majority of the remainder of her time engaged in various clerical tasks. In keeping with the guidance provided by the federal regulations, the forum concludes that

Claimant's primary duties were not sufficiently related to "management policies or general business operations" to make Claimant an exempt administrative employee.

Respondent also failed to prove that Claimant "customarily and regularly exercise[d] discretion and independent judgment," as required by OAR 839-020-0005(2)(b). "Independent Judgment and Discretion" is defined as "the selection of a course of action from a number of possible alternatives after consideration of each, made freely without direction or supervision with respect to matters of significance." OAR 839-020-0005(5). Importantly, the phrase "does not include skill exercised in the application of prescribed procedures." The only decisions Claimant made as part of her job involved choosing the particular way in which she would carry out procedures prescribed by Ryder. For example, Ryder told Claimant to file documents, and she determined how the documents were to be filed. Claimant seldom, if ever, made independent choices – free from Ryder's direction or supervision --- among alternative courses of action. For this reason, too, Claimant was not an exempt administrative employee.⁵

Because Claimant was not an exempt employee, Respondent was required to pay her one and one-half times her normal rate of pay for all hours worked in excess of 40 per week. OAR 839-020-0030(1). BOLI has implemented regulations setting forth several different methods by which overtime pay may be calculated, depending on the compensation scheme under which the employee works. In this case, the Agency compliance specialist calculated Claimant's overtime pay pursuant to the rule applicable to "[c]ompensation based exclusively on hourly rate of pay," OAR 839-020-0030(3)(a). The compliance specialist determined that Respondent was required to pay Claimant one and one-half times her hourly wage for all hours worked in excess of 40 per week. However, because the compliance specialist deemed Claimant to be an hourly

employee, she also concluded that Respondent was required to pay Claimant only for hours she actually worked. Because Respondent had paid Claimant for 40 hours of work even during weeks that she worked fewer than 40 hours, the compliance specialist essentially concluded that Respondent had overpaid Claimant during those weeks, and gave Respondent credit for those overpayments against the amount of overtime pay it owed Claimant. Consequently, the compliance specialist concluded that Respondent owed Claimant only \$963.50 in unpaid wages.

The forum disagrees with the compliance specialist's method of calculating Claimant's wages. Respondent and Claimant both understood that Respondent was paying Claimant a weekly salary calculated by multiplying a certain hourly rate by 40 hours per week. The appropriate method of calculating overtime wages for a non-exempt salaried employee under these circumstances is set forth in OAR 839-020-0030(3)(d). Under that rule, the employee is entitled to one and one-half the regular hourly rate of pay *in addition to* the salary he or she is paid weekly. Thus, Claimant was entitled to be paid overtime wages for all hours she worked in excess of 40 per week, without any deduction for the weeks during which she worked fewer than 40 hours. Using this calculation method, the forum has determined that Respondent owes Claimant \$2407.50 in unpaid wages.

In the proposed order, the ALJ stated that Claimant would be awarded only the smaller amount of damages (\$963.50) the Agency had requested in the Order of Determination. The Agency filed exceptions asserting that the commissioner has authority to award damages in excess of those sought in the charging document and should not "penaliz[e] Claimant for the Agency's calculation error." The forum agrees that the commissioner has authority to award monetary damages exceeding those sought in the charging document, at least where, as here, the damages are awarded as

compensation for statutory violations that the Agency did allege in the charging document. This Final Order, therefore, awards Claimant the entire \$2407.50 in unpaid wages.

The Respondent filed exceptions untimely; therefore the forum need not consider them. In its exceptions, filed through different counsel than that representing Respondent in the hearing, Respondent asserts that counsel representing it in hearing failed to prepare or present its case. Respondent further asserts that had it known the Agency would file exceptions asserting the commissioner should award the claimant the entire amount of unpaid wages, Respondent would have filed timely exceptions. Finally, Respondent argues against the substance of the Agency's exceptions.

As stated, the forum is not obligated to consider the Respondent's untimely exceptions. However, in light of factors creating an unusual circumstance, the forum has nonetheless reviewed Respondent's exceptions, but is unpersuaded by them. Each party is presumed to recognize that, inasmuch as both the Agency and Respondent are entitled to file exceptions, the proposed order may be modified either for or against the interests of either party. Therefore, neither party is entitled to rely upon the terms of the proposed order as a defense to failing to adequately assert or protect its own interests.

RESPONDENT MUST PAY CLAIMANT PENALTY WAGES

The forum may award penalty wages where the respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

In this case, Ryder, Respondent's president, made a conscious decision not to pay Claimant overtime wages even though he knew that Claimant was working more than 40 hours during some weeks. Indeed, Ryder explicitly told Claimant that he would not pay her overtime wages once her salary reached a certain level. Respondent's failure to pay Claimant's overtime wages was willful and it is required to pay penalty wages. As explained in Finding of Fact – the Merits 26, *supra*, the forum calculates penalty wages to be \$4453.68.

In the proposed order, the ALJ stated that Claimant would be awarded only the lesser amount of penalty wages (\$4212.00) the Agency had sought in the Order of Determination. In accordance with the Agency's exceptions, which point out that the commissioner may award damages in excess of those sought in the charging document, the forum awards Claimant the entire \$4453.68 in civil penalty wages that Respondent owes her as a result of its failure to pay all her wages when due.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages it owes as a result of its violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Contractors Plumbing Service, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Rhonda Ralston in the amount of SIX THOUSAND EIGHT HUNDRED SIXTY-ONE DOLLARS AND EIGHTEEN CENTS (\$6861.18), less appropriate lawful deductions, representing \$2407.50 in gross earned, unpaid, due, and payable wages and \$4453.68 in penalty wages, plus interest at the legal rate on the sum of \$2407.50 from April 1, 1999, until paid and interest at the legal rate on the sum of \$4453.68 from May 1, 1999, until paid.

¹ The forum notes that it would find Ryder's testimony not to be credible even if it did not take into account the dispute about the "missing" time cards.

² See 29 USCS § 213(1), which makes exempt:

“(1) any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *).[.]”

³ See 29 CFR § 541.2.

⁴ Claimant did place purchase orders after being instructed by Ryder regarding what supplies to buy. That type of activity, which is merely following specific instructions given by a supervisor, is not the type of independent “purchasing” authority contemplated by the rule.

⁵ The fact that Claimant did not customarily and regularly exercise discretion also precludes a finding that she was an exempt executive employee. See OAR 839-020-0005(d).